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THE RECORD

OF THE ASSOCIATION OF THE BAR

OF THE CITY OF NEW YORK

VOLUME FOUR

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THE RECORD
OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

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Volume 4 — January 1949 — *Number 1*

Association Activities

IN THIS number of THE RECORD the Committee on Grievances through its Chairman, Sherman Baldwin, announces the retirement of Einar Chrystie, who for forty-one years out of his forty-five years of service with the Association has been the Attorney-in-Chief for the Grievance Committee. Mr. Baldwin's letter to the membership expresses the regret which all members must feel that Mr. Chrystie has retired from active service. As Mr. Baldwin has said, Mr. Chrystie "has not only brought great credit to the Association but he has also made his office one of importance."

BROOKLYN LAW SCHOOL was declared the winner of the inter-law school competition sponsored by the Committee on Junior Bar Activities, Frederick P. Hass, Chairman. Yale Law School was the runner-up. The winner was awarded the Samuel Seabury Prize, a sterling silver bowl, which will be retained by Brooklyn Law School for one year and then placed in competition again. Nine law schools in all participated in the competition, which took two days to complete. During those two days some six hundred students, friends of the contestants, and interested lawyers attended the arguments. The court sitting on the final argument was com-

posed of The Honorable David W. Peck, The Honorable Ferdinand Pecora, The Honorable Henry Clay Greenberg, The Honorable Samuel C. Coleman, and The Honorable Francis E. Rivers. Counsel for Brooklyn Law School were Leonard Garment, Norman Dreyfuss, and Henry E. Otto, Jr., and counsel for Yale Law School were Robert Young, Douglas Franchot, and Philip Willson.

THE SPECIAL Committee on the Unification of the Courts, Porter R. Chandler, Chairman, has asked the committees of the Association which have jurisdiction over the various courts to consider a proposal which would establish only two principal courts in the City of New York—one of superior jurisdiction, both civil and criminal, and one of inferior jurisdiction, both civil and criminal. The superior court would include the justices of the present Supreme Court, the Court of General Sessions, the County Courts, and the present City Court. The lower court, with an enlarged jurisdiction and higher salaries for the judges, would under the plan comprise the justices of the Municipal Court and the Court of Special Sessions. Mr. Chandler will report on the final conclusions of his Committee to the Stated Meeting on January 18.

THE COMMITTEE on International Law, A. A. Berle, Jr., Chairman, has established a subcommittee, under the chairmanship of John B. Marsh, to study the validity in New York of foreign laws affecting the title or control of property located in New York.

THE COMMITTEE on Art, Clarence J. Shearn, Jr., Chairman, has accepted as gifts to the Association two portraits—one of the late Emory Buckner, presented by a group of his former associates, and the other of the late Martin Conboy presented by the Foley Square Heads. The pictures are on exhibition in the west reading room. The Committee has also selected portraits to be perma-

nently placed in the Meeting Hall and has authorized their restoration and repair. The Executive Committee at its last meeting authorized the Art Committee to proceed to purchase hangings for the windows in the Meeting Hall.

JUSTICE OWEN J. ROBERTS spoke before the Association on Saturday, December 11, under the auspices of the Special Committee on the Federal Courts, of which Edwin A. Falk is the Chairman. Justice Roberts discussed the Committee's recommendations for fortifying the independence of the Supreme Court. Arrangements have been made to publish Justice Roberts' address in the January number of the American Bar Association Journal.

THE EXECUTIVE Committee at its December meeting authorized the Association's Committee on Unlawful Practice of the Law, William S. Gaud, Chairman, to join with the New York County Lawyers' Association in the brief now being filed in the *Bercu Case* in the Court of Appeals or, in the Committee's discretion, to file a short brief on its own behalf.

SENATOR MACNEIL MITCHELL and John W. MacDonald, Executive Secretary of the Law Revision Commission, addressed the organization meeting of the Committee on State Legislation, of which John A. Bross is the Chairman. Both speakers emphasized the value of the Committee's legislative bulletins and made some suggestions for their improvement.

PUBLISHED IN this number of THE RECORD is a letter signed by Frederick v.P. Bryan, Chairman of the Association's Special Committee on Military Justice, and directed to Professor Edmund M. Morgan, who is serving as chairman of the Committee on a Uniform Code of Military Justice in the Office of the Secretary of

Defense. The letter, which is also signed by the chairmen of the Military Justice Committees of the American Bar Association, the New York County Lawyers' Association, and the War Veterans' Bar Association, summarizes the recommendation of these Associations looking toward a system of military justice that is removed from command control and has a simplified system of review. The recommendations are in addition to the reforms already effected for the Army by the Elston Bill.

THE COMMITTEE on Aeronautics, Hamilton O. Hale, Chairman, at its organization meeting decided to sponsor again a discussion of some phase of aviation law that would be of interest both to lawyers working in the field and to the industry. Harper Woodward was appointed chairman of the subcommittee in charge of the event.

THE HONORABLE Albert B. Maris, Circuit Judge, United States Court of Appeals, Third Circuit, spoke at the meeting of the Section on State and Federal Procedure, Werner Ilsen, Chairman, on December 15. Judge Maris, who was appointed by the late Chief Justice Stone as Chairman of the Judicial Conference's Committee on Revision of the Judicial Code, addressed the meeting on the subject of the New Federal Judicial Code.

AT THE Stated Meeting of the Association held on December 14, the report of the Committee on the Bill of Rights, Lloyd Paul Stryker, Chairman, dealing with standards for congressional investigations was adopted. The Association also approved a report of the Committee on Medical Jurisprudence proposing legislation for the rehabilitation of alcoholics. The report was presented to the Association by Edmund T. Delaney and was the result of a cooperative effort between the Association and The New York Academy of Medicine. The report of Milton P. Kupfer, Chairman

of the Committee on Bankruptcy and Corporate Reorganizations, was also approved by the Association.

ON DECEMBER 7 Carrol M. Shanks, President, The Prudential Insurance Company of America, spoke before a large audience on the subject of The Lawyer in Business, His Opportunities and Contributions. The lecture was the third of a series sponsored by the Committee on Post-Admission Legal Education, of which Cloyd Laporte is the chairman.

The fourth lecture in this series will be given on January 26 by Robert M. Hutchins, Chancellor, University of Chicago. The lecture will be preceded by a buffet supper at 6:15.

ON SUNDAY, January 16, the Association and the New York County Lawyers' Association will hold a memorial service in memory of the late William Nelson Cromwell. The service will be held at the House of the Association at four o'clock in the afternoon. Nathan Lewis Miller, former Governor of the State of New York, and Samuel Seabury, former judge of the New York Court of Appeals, will speak.

THE COMMITTEE on Law Reform, James N. Vaughan, Chairman, has appointed a subcommittee to consider and report on the practice said to be used in the legislature of permitting introduction of major and sometimes controversial legislation within a few days of adjournment, thereby precluding opportunity for analysis, hearing or adequate consideration by interested public and professional bodies.

The Calendar of the Association for January

(As of December 15, 1948)

January 3 Meeting of Section on Labor Law
"On Trial"—Radio Program, WJZ–TV (Channel 7) 8:00–8:30 P.M., EST, and WJZ (770), 10:30–11:00 P.M., EST

January 5 Dinner Meeting of Executive Committee
Joint Meeting of Section on Drafting of Legal Instruments and Section on Wills, Trusts and Estates

January 6 Meeting of Entertainment Committee

January 10 Dinner Meeting of Committee on International Law
Dinner Meeting of Committee on Municipal Affairs
Dinner Meeting of Committee on Professional Ethics
"On Trial"—Radio Program, WJZ–TV (Channel 7) 8:00–8:30 P.M., EST, and WJZ (770), 10:30–11:00 P.M., EST

January 11 Dinner Meeting of Committee on Copyright
Meeting of Committee on Real Property Law
Meeting of Committee on State Legislation

January 12 Meeting of Section on Corporations
Dinner Meeting of Committee on Administrative Law
Dinner Meeting of Committee on Insurance Law

January 13 Meeting of Section on Taxation
Meeting of Committee on Unlawful Practice of the Law

January 16 Joint Meeting of this Association and the New York County Lawyers' Association in memory of William Nelson Cromwell, 4 P.M.

January 17 Round Table Conference. Guest—Hon. Benjamin J. Rabin, Justice of the Supreme Court of the State of New York.
Dinner Meeting of Committee on Federal Legislation
"On Trial"—Radio Program, WJZ–TV (Channel 7) 8:00–8:30 P.M., EST, and WJZ (770), 10:30–11:00 P.M., EST

January 18 *Stated Meeting of Association and Buffet Supper—6:15 P.M.*
Meeting of Committee on Real Property Law
Meeting of Committee on State Legislation

January 19 Joint Meeting of Section on State and Federal Procedure and Section on Trials and Appeals
Meeting of Committee on Admissions

January 24 "On Trial"—Radio Program, WJZ-TV (Channel 7) 8:00–8:30 P.M., EST, and WJZ (770), 10:30–11:00 P.M., EST

January 25 Dinner Meeting of Committee on Medical Jurisprudence
Meeting of Committee on Real Property Law
Meeting of Committee on State Legislation

January 26 Address by Robert M. Hutchins, Esq., Chancellor, University of Chicago—Topic to be announced later—*Buffet Supper—6:15 P.M.*

January 28 Annual Meeting of New York State Bar Association

January 29 Annual Meeting of New York State Bar Association

January 31 Meeting of Library Committee
"On Trial"—Radio Program, WJZ-TV (Channel 7) 8:00–8:30 P.M., EST, and WJZ (770), 10:30–11:00 P.M., EST

Letter from the Chairman of the Grievance Committee

To the Members of the Association:

On December 31, 1948 Einar Chrystie retired after forty-five years of service as Attorney for the Grievance Committee of our Association. I believe that during these years the reputation of the Committee as an agency devoted to the service of the public and the community in general has become generally recognized. We like to think that it has acquired a reputation for fair dealing, integrity and fearlessness in the investigation and prosecution of charges of professional misconduct and unethical practices—whatever the reputation of the Committee, that part which is good and fine is largely due to Einar Chrystie. I have yet to meet anyone who has been associated with him who does not admire and respect his strength of character, the directness of his approach, his sympathetic understanding and his complete honesty and fairness. The Association has been indeed fortunate to have been able to command the services of such a man for so many years. Committee members and Committee chairmen come and go; most of them certainly have also given conscientious service to the Committee work; all of them, and particularly those who have successively acted as Chairmen, have relied heavily on Mr. Chrystie's sound advice, his good judgment and his wealth of experience. Because of the way in which he has administered the office of Attorney-in-Chief he has not only brought great credit to the Association, but he has also made his office one of importance. It is the duty of the present leaders of the Association to leave no stone unturned in making certain that the work of its Grievance Committee is continued on the same high level as that achieved during Mr. Chrystie's regime.

For six months or more we have been endeavoring to find the right man to succeed to this exacting office. We believe that we have found in Frank H. Gordon a man worthy of the trust. The Executive Committee has appointed him to be Chief Counsel of

the Grievance Committee, such appointment to take effect as soon as he can arrange to be released from his present position as Special Assistant to the Attorney General of the United States.

A short sketch of Mr. Chrystie's life and of the achievements of the Committee during his term of office and a statement about Mr. Gordon are printed below.

SHERMAN BALDWIN

SKETCH OF MR. CHRYSTIE'S LIFE

Mr. Chrystie was born on March 13, 1875 in Oslo, Norway and came to New York with his parents in 1880. He attended the New York Preparatory School and the New York Law School, being admitted to practice in New York in 1897.

In 1903 Mr. Chrystie became a part-time assistant to the secretary of the Committee on Grievances of the Association. He was also engaged in the practice of law. However, the work of the Committee on Grievances increased rapidly, and soon required the full-time services of an attorney. Mr. Chrystie then gave up his private practice and thereafter devoted his entire time to the work of the Committee. The Committee now employs four attorneys, a clerk and three stenographers.

In March, 1906 Mr. Chrystie was appointed acting attorney for the Committee, and in April, 1907 he was appointed attorney.

During the term of Mr. Chrystie's employment the number of complaints handled by the Committee on Grievances increased from 87 in 1904 to the peak in 1935 when 2,926 complaints were handled. In the year ending April 30, 1948, 1,215 complaints were received. The complaints received and disposed of from 1904 to 1948 numbered 61,051. A total of 1,235 disciplinary proceedings were brought against attorneys resulting in 1,012 disbarments, suspensions or censures. The balance was disposed of by dismissals by the court, by discontinuance or by death of the accused.

In Mr. Chrystie's opinion the most interesting case he prosecuted as the attorney for the Association was one which he ultimately lost but which resulted in a very important change in the

status of the Association in disciplinary proceedings. This was the Dolphin case, reported in 208 App. Div. 228 and in 240 N.Y. 89.

Mr. Dolphin was employed as an assistant corporation counsel assigned to the Police Department of the City of New York. In November, 1921 the Birth Control League was conducting an active campaign in New York and in the course thereof staged a public meeting at the Town Hall. The police interfered and several prominent women supporters and sponsors for the meeting were brought to Police Headquarters where they were subjected to questioning and later brought into the police court, but they were ultimately discharged. Mr. Dolphin had charge of the matter and a complaint was lodged against him with the Committee on Grievances. It was decided to prosecute on charges of unprofessional conduct. After a warmly contested trial the referee appointed to hear the case filed a report finding Dolphin guilty of professional misconduct. The Appellate Division, however, refused to affirm the finding. Leave to appeal to the Court of Appeals was denied by the Appellate Division. A subsequent application made for the same relief in the Court of Appeals was granted.

Henry W. Taft, then President of the Association, and Howard Townsend, then Chairman of the Committee on Grievances, presented the case in the Court of Appeals. The Court decided that the Association was not an aggrieved party and therefore had no standing in that court. Subsequently Section 90 of the Judiciary Law was amended so as to give any bar association a right to appeal to the Court of Appeals from orders entered in disciplinary proceedings.

BIOGRAPHICAL SKETCH OF FRANK H. GORDON

Mr. Gordon was born in 1911. He attended Princeton University and the Yale Law School. He was admitted to practice in New York in May, 1937, and was later admitted to practice in the federal district courts and court of appeals.

Mr. Gordon served for several years as Assistant United States Attorney, being assigned to the Criminal Division. As a member

of the Indictment Committee he assisted in the preparation of the Manton indictment.

During World War II Mr. Gordon was a lieutenant colonel in the field artillery. He was later transferred to the Legal Division, Control Council for Germany.

Upon his return Mr. Gordon was promoted to the position of Special Assistant to the Attorney General. He was assigned to try the war fraud case against Corrigan, Osborne & Wells, Inc. (Management Consultants), and Carl L. Norden Inc. (manufacturer of the Norden Bomb Sight). The initial trial before Judge Knox in November, 1946 ended in a mistrial. On the second trial former Commander John D. Corrigan, whose activities as a Navy troubleshooter received considerable attention from the press in 1944, and his partner were convicted and served their sentences although the convictions were later reversed on technical grounds.

In 1947 Mr. Gordon was assigned to the Antitrust Division and was placed in charge of the staff working on cases involving foods and food products. When the cases against the twelve leaders of the Communist Party were presented to the Grand Jury in June, 1948, he was borrowed from the Antitrust Division to assist United States Attorney John F. X. McGohey in the preparation of the cases against the Communist Party leaders.

The Settlement of Labor Disputes

By Harry Shulman

Deep interest in labor disputes is for lawyers no longer avocational. It is professional. Time was when lawyers were called in only when judicial intervention was sought for a death blow to a dispute that had already terminated a relationship. Now, with the growing recognition of labor relations, highlighted by the growth of unionism and collective bargaining, the lawyer, even without solicitation by him, is increasingly pressed into service in a variety of roles. As advocate, legislator, judge, arbitrator and governmental administrator, he is called upon not only for the law and legal procedures but to counsel on, formulate and decide matters of labor relations policy.

Each of these roles in which the lawyer is cast may demand its own competence. But all are parts of a larger operation in which they must be smoothly integrated. We must understand that the stake common to them all is nothing less than our political and economic organization—our general welfare. What we handle in the form of labor disputes is elsewhere the source of political and social upheaval.

For the base of labor disputes is not a creation of unions. The base is the fact of industrial employment and social organization. If we never heard of labor unions, we would still be concerned with the levels of prices and wages, the cost and standard of living of our people, the effect of working conditions on the health and safety of workers.

In some other lands, they have chosen to attack these problems by governmental determination. We in this country choose to leave them in private hands—save for standards and prohibitions

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Editor's Note: Mr. Shulman, a member of the bars of Rhode Island and New York, graduated from Harvard Law School in 1926. He served as law clerk to Mr. Justice Brandeis from 1929 to 1930 and since 1930 has taught at the Yale Law School, where he is the Sterling Professor of Law. Mr. Shulman is a special conciliator of the United States Conciliation Service and has made a distinguished record as Umpire of the Ford-United Automobile Workers Contract.

at the extremes. We do so in part because we believe that this is a more effective means of achieving material well-being. In perhaps greater part, we choose this method because we prize the liberty which is its essence.

But it is important to recognize that, however different our methods, we attack the same problem—the adjustment of the needs of people in an organized society. Our method, like theirs, must justify itself by its results or risk abandonment. For there are no fixed methods of adaptation. We have been created and endowed with great capacity for friction and disharmony. But the fashioning of adjustments has been left as a challenge to our intelligence and ingenuity.

A fundamental for those engaged in the process of settling labor disputes is, then, the constant awareness that they are agencies for the accommodation of basic human wants and human conflicts and that they will continue this function only if their performance is effective in making the accommodation. The process is continuous and the touchstone of success is much more fundamental than the achievement of ephemeral victory in a single controversy.

All that I have mentioned comes into focus in this country in the framework of the individual plant. Whether organized or unorganized, employees are concerned about their livelihood. They are concerned about the regularity of their employment, about the relationship of their wages and conditions to those enjoyed by others around them, about the fairness of their treatment in such matters as recognition, promotion, discipline, seniority and the like.

The employer, from the standpoint of the welfare of his own business, must likewise be concerned about these things—again, whether his employees are organized or unorganized. For the morale of his employees affects their performance. Whether he is enlightened or benighted, the employer must determine what wages to pay, what production rate to establish, whom to lay off, whom to promote, how to fill vacancies and so on.

With his employees unorganized, the employer meets these

problems as he deems best. He may make his determinations on the basis of a well formulated policy. Or he may make them on the basis of spot judgments as specific problems arise.

With his employees organized, spot judgment must yield to formulated policy. Theoretically, of course, collective bargaining may proceed without term agreements. Collective bargaining requires only joint participation; and this could be restricted to specific situations as they arise. But while each side may desire to retain its own freedom of action, it wishes also to be assured about the action of the other side. This desire for assurance, for security, makes term agreements almost inevitable. Accordingly, collective bargaining requires the formulation of policy, which, when agreed upon, becomes the collective agreement.

But the creation of the collective agreement is only one phase of collective bargaining. Though it is the more dramatic and is frequently mistaken for the whole or the most important part of the process, it is probably the less important.

For the adoption of a future policy emphasizes, rather than obviates, the need for continuous administration. Collective bargaining requires joint participation in this process as well as in policy formulation. And, as in governmental regulation of complex affairs where successful results are achieved even more by the quality of administration than by the character of the underlying legislation, so also the success of collective bargaining depends not only on the nature of the collective agreement, but even more on the day to day administration in the plant.

This is not to say that collective bargaining is constant from plant to plant. Quite the contrary. Disputes at, let us say, General Motors, with its more than a quarter of a million employees, cannot be molded in the image of the delicatessen store in New York City. Arrangements between strong national unions and large employers should not be viewed with the suspicions surrounding terms imposed upon unorganized employees or company dominated unions. The detailed practices of a manufacturing plant are not applicable without change to employment at sea, the editorial rooms of a newspaper or magazine, or schoolrooms and

university halls. Only with respect to basic needs and attitudes is generalization approximately true. Beyond that, one must specify the industry, the union, the locality, the plant, the nature of the dispute, the particular people involved, and all the other numerous factors which necessarily make for difference.

But there is virtue in discussing the basic. From it can be gained perspectives and attitudes which are all-important in the approach to specific disputes.

Basic in this sense is an awareness of the complexity of the causes of labor disputes—an awareness which dispels casualness and breeds respect. We know now, for example, that facile economic analysis provides no complete answer; for we are dealing not with physical measurements but human satisfactions. It is not an absolute condition but men's appraisal of it that makes it good, indifferent or intolerable. And that appraisal is subject to a variety of non-economic stimuli. Though the social sciences have not yet uncovered all the mysteries of the human being, they have taught us at least that fundamental human needs and traits lie at the core of labor disputes.

Accordingly, it has become fashionable to speak, sometimes contemptuously, of non-rational behavior of workers in the shop. But this form of statement should not mislead. Neither workers nor supervisors become different animals when they enter a plant; their behavior strikes me as no more and no less non-logical or non-rational than that of people generally. What observers term lack of logic or reason is actually a fairly consistent response to a set of knowledge, fears and beliefs not shared by the observers. For, unless a relationship of complete faith and trust has been established, both management and men are likely to ascribe to each other motives and purposes different from those which actually activate them. It is this product of differences in experience and information that makes efforts at effective communication and understanding so imperative—real communication and understanding designed to evoke and guide reason.

Private settlement through communication and understanding —through collective bargaining—requires some common assump-

tions. At least for the purposes of the dispute, both parties must accept the framework of which it is characteristic. This means acceptance of the system of private profit enterprise and of the method of collective bargaining. It means that the right of workers to organize and participate in their industrial government is unquestioned. And it means that an employer should not be subjected to union efforts, through the guise of a dispute with him, to accomplish a political change beyond the employer's control and with respect to which the employer is a member of the general public.

A further requirement is the recognition of the importance of the relationship and the chosen method for its continuance. This requires that, on the management side, labor relations be regarded not as an annoying side issue, but as a matter of primary concern at least on a par with sales and costs; and deserving the attention of top officials. And on the union side, it means a sense of responsibility for action or inaction, a let-up in the propagation of blind hostility to the employer, a realization that cooperation with the employer is not inconsistent with loyalty to the union.

Once this structure of attitudes is established, the parties operate under conditions favorable to the settlement of disputes. More than that. They are able then to seek to prevent disputes from arising. For like the maintenance of the public health, true labor dispute settlement depends not so much on the strenuous efforts made in the crisis, though they are obviously important, as it does upon continuous advance care and preparation to ward off crisis by building health and eliminating sources of disease.

What does this continuous effort require? It requires that supervisors of all ranks in the operations line—particularly the lower ranks in direct contact with the employees—be selected with an eye in part to their capacity to adjust shop frictions; and that it be part of their duty to consider in all their actions the effects upon and the reactions of their men. The function should not be delegated to men without authority as a disagreeable job of "soft-soaping." If the assistance of staff specialists—labor rela-

tions men—is necessary, they must be men of independence able to advise effectively and not merely to endorse unquestioningly the determinations of line supervision.

The continuous effort requires a procedure for handling employee complaints and problems. This is commonly called the "grievance procedure" and is frequently characterized as the heart of the collective agreement or the collective bargaining relationship.

The details of the procedure must, of course, be tailored for the particular enterprise. The important thing is that it be easily available, that it be adequate to handle all complaints and that it be administered tolerantly.

Some speak of the "grievance procedure," with beguiling metaphor, as the judicial branch of the industrial government. Its function is thus thought of as that of ascertaining and enforcing rights and duties under the collective agreement. To be sure, that is one function. But it is a subordinate one. The primary function of the grievance procedure is to ease and advance the cooperation of the parties in their common enterprise—to maintain the continuity of joint endeavor which the collective agreement only initiates.

Administration of the grievance procedure on this broad base requires a pragmatic view of the collective agreement removed from the deceptive garb of the "typical" classroom contract for the sale of a house or horse. The collective agreement does not contemplate single "end results," with stated rights and obligations for their achievement. It is not and cannot be based on an assumption that specific performance can be compelled or that damages are an alternative for performance or compensation for non-performance.

The collective labor agreement merely states some of the conditions under which the parties will daily work together in the operation of the common enterprise from which they will both derive their shares, satisfactions and fears. The objective in which both parties are interested is the continuous operation of that enterprise. The collective agreement aids the achievement of

that objective; it does not assure or command it. Achievement depends wholly on continuous daily cooperation, and cannot result merely from strict enforcement of the agreement.

Moreover, the collective labor agreement is not and cannot be so comprehensive and clear as to provide for all the sources of friction which might interfere with the attainment of the parties' objectives. It cannot be so comprehensive, first, because of the sheer inability to anticipate all contingencies in a dynamic, competitive economy with an advancing technology. And it cannot be so comprehensive, secondly, because of the utter impracticability of securing agreement in a relatively short time on all hypothetical situations that can be imagined and that involve human reactions.

Even with respect to anticipated situations, the collective labor agreement cannot be altogether clear. This is not due only to hasty drafting under pressure; or to the literary inadequacies of lay draftsmen; or to the normal vagaries of language which confound the intent of even the lawyer draftsman. In labor agreements there are other reasons for imprecision. The agreements are frequently made by representatives on both sides whose prestige is in the balance. Face-saving is an important interest which can be ignored at the risk of cessation of operations, or served by statement less than bitingly clear. Again, abundant detail, even if agreed to by the negotiators, may be avoided because of the abundant opportunity it provides for aggregating minor objections by different individuals into a deceptive total dissatisfaction which may result in rejection by the principals. Or, desiring agreement, the parties may adopt inconclusive language precisely because they are in disagreement as to detailed application and wish to leave to the future the working out of particular differences, with the agreement serving only as one guide.

The collective agreement, then, like others, is, indeed, intended to commit the parties and should faithfully be respected by them. But it is also like a general structure of government designed to aid the parties' future operation. It looks to daily ac-

commodation to problems in the spirit in which the agreement was made.

The grievance procedure must be administered with this pragmatic view of the collective agreement. It must provide opportunity for the consideration of any complaint or request. Any grievance may be a symptom or seed of dissatisfaction and unrest worth looking into. All should be given serious consideration and determined without the use of the demurrer or motion for summary judgment.

This is not to say that all grievances are of equal importance, or that all should be granted or that the contract should be ignored in their consideration. Quite the contrary. Some grievances may be found to be merely indifferent attempts to get something if something is due. The very existence of the collective agreement gives rise to claims based not on dissatisfaction or sense of injustice, but only on what is thought to be contractual right. Other grievances may be highly individualized and reflect no general sentiment. Still others may show widespread dissatisfaction. Some may be found to result from violations of the agreement; others may be efforts to change the agreement. Some may be adjusted without the sacrifice of any substantial interest of the employer; the adjustment of others might involve an undue cost in that respect.

The grievance may have to be denied, of course. But the denial will sit better and be more conducive to future cooperation if it is made after honest and serious consideration, and if it is explained in a manner designed to elicit sympathetic understanding rather than to provoke animosity by naked insistence on "legal right" or "prerogative."

To achieve these objectives it is desirable, of course, that all persons who handle labor relations or grievances in any of the stages have the personal qualities requisite for the task. But at least at some stage, there is need for participation by patient men, men who are willing to try to understand the other side's views and needs, men who like people and are not repelled by their

differences, men who are willing to doubt their own predilections, men who understand the problems of human relations in mass employment and who put persuasion above dictation.

Were the representatives of both sides all such paragons, their joint consideration would adjust their disputes. But since they are not, what then?

For disputes during the term of the collective agreement, arbitration is the increasingly accepted answer. With its increasing use have come criticisms and diverse proposals for reform and improvement. Appraisal requires first an understanding of the function of labor arbitration.

Arbitration is sought in order to accomplish that which the parties' collective bargaining has failed to accomplish, namely an adjustment of their dispute. Now the objective of the parties' own efforts at settlement, even when the dispute relates to a past event, is not merely to provide redress for a past wrong. The parties' concern, it is worth repeating, is with their present and future relation, with today's and tomorrow's production and employment. Even when the dispute relates to a past event, the primary importance of its settlement is in the parties' present and future work together.

Arbitration as the follow-up to clinch that effort of the parties must have the same objectives in view. Arbitration is not substituted for litigation merely because the latter is too costly, too dilatory, and too professionalized, though these are part of the reason. Arbitration is chosen primarily because it provides a flexible mechanism suitable for continuation of the parties' own efforts. What is sought from it is not a judgment for or against one of two adversaries who part company on institution of the trial. As a method of settling labor disputes, arbitration would be as unacceptable as litigation if it were as removed from the parties' control and from the context of their disputes.

To be effective as a regular method of settling disputes without cessation of production, the arbitration tribunal must have the confidence of the parties. They must be confident that the tribunal is intelligent, understanding and fair minded. To achieve

this confidence, the parties may set up such a tribunal as they like. It may be a single arbitrator or a group. If the latter, they may be all non-partisan or some of them may be partisan, either in the sense of being actual representatives of each party or neutrals, with a hoped for bias, designated by them. They can narrowly restrict the issue or the procedure or leave both fairly wide open..

For the most effective performance of the function of labor arbitration, a standing arbitrator or tribunal is desirable. By continuous or repeated association, he gets to know the parties and their problems to a degree unattainable in a single proceeding no matter how protracted. This familiarity not only increases the efficiency of the proceeding but increases also the chances of wise judgment. For, while knowledge is not a guarantee of wisdom, it is a prerequisite. The standing arbitrator can more readily get a "feel" for the nature of the dispute and avoid the pitfalls into which good intentions unchecked by knowledge might otherwise hurl him. And in the same way, there is advantage in the parties' knowing the arbitrator.

If the arbitrator justifies the parties' confidence, he may be useful in ways other than by deciding specific grievances. The arbitration proceeding itself as well as his awards can become an educational device for the consideration and discussion of problems and policies. The arbitrator may be the catalytic agent to bring the parties together for mutual understanding. He may become a friend whose aid or comfort may be enlisted by individuals on each side in connection with internal frictions. For it must be remembered that employer and union are not single individuals, but groups of persons. What may be in form a labor dispute may be in fact a dispute between different factions in management or in the union. The arbitrator may thus aid in the promotion of internal peace on each side as well as peace between the sides.

Whether before a standing or an *ad hoc* arbitrator, the proceeding should afford full opportunity for the airing of the grievance without restraint from technical rules of procedure—or even purposeless technicalities of substance. That may offend the ad-

vocate's sense of artistic and professional presentation. But that sense needs some modification in labor arbitration. For the advocate and his client must realize that one important purpose of the arbitration is to promote the parties' continuing relation, that the arbitration can do this through its educative and persuasive power, not merely by its final dictate, and that the effort to win as in a court litigation may result only in a hollow victory. How the award is won may be more important than whether it is won. The advocate will thus serve both his client and the public interest best if he treats the proceeding as an attempt to solve a problem in the wisest manner, rather than as an opportunity to win a case. Aggressive speeches against the adversary belittling him or his associates and displays of contempt or superiority may temporarily impress the client; but they more surely do not help to advance the cooperation which his client needs most and may in fact retard it to the considerable damage of both his client and the situation.

With this conception of arbitration, questions as to whether an arbitrator should mediate or "socialize" with the parties are idle talk. Where the situation permits it, he will do both; where the situation does not permit, either because of the nature of the case or the character of the parties, he must do neither. As previously stated, there are cases which present an issue for determination not symptomatic of any wider trouble nor pregnant with serious implications for the parties' future whichever way the decision goes. The decision may reflect on the arbitrator's intelligence and be quite displeasing to the losing party, but it relates to a single instance and will not shake the relationship. Attempt at mediation in such a case, particularly in *ad hoc* arbitration, is quite undesirable. It reflects upon the arbitrator's courage. It wastes the parties' time. And it unduly glorifies compromise over insistence upon the right.

But in other cases, the proceeding may disclose an underlying misunderstanding which may have prevented earlier settlement. It may present an issue hardly susceptible of a yes or no answer, or one which is part of a larger problem for which the implications

of the issue have not been fully considered, or one which is the beginning of a planned strategy to accomplish an end not fully disclosed either to the adversary or the arbitrator. Now in such cases mediation is worth a try. The nature of the try depends on the situation. The *ad hoc* arbitrator may, at the hearing or at a subsequent meeting with the parties jointly, point out the misunderstanding, reinterpret the parties' positions so that the misunderstanding is dispelled, and inquire whether the parties do not desire to reconsider the case. How much farther he may go depends upon the encouragement he then receives from the parties. Not all mediation requires efforts by the mediator to persuade the parties or to suggest solutions.

If the arbitrator is in a continuing relationship of confidence with the parties, he may do more. He may see the parties separately; he may use different approaches for each; he may not only clear up misunderstanding and reinterpret positions, but he may also point out the dangers of the positions or the alternative decisions; he may answer objections and affirmatively seek to persuade; he may attempt to adjust the underlying and real problem which technically is not before him for decision as a preliminary to the disposition of the case that is before him; he may, if the problem is a recurring one, seek the establishment of a procedure for handling it so as to avoid further grievances and arbitration.

Few would deny the value of these advantages if they could be secured without risk of disadvantage. But there are risks. We can put to one side, as not involved, the risk of outright corruption. An arbitrator willing to be corrupted and parties desiring to bribe him will not be deterred by prohibition of mediation or socialization. More likely, they will observe the amenities and make their deals behind the screen of strict regularity.

But there is the risk of resulting unconscious undue influence or reliance upon unchecked evidence. This risk cannot be gainsaid, but it can be adequately guarded against. An arbitrator worthy of the parties' confidence and able to maintain his fairmindedness despite all the influences around him outside of his work as arbitrator may be expected to guard against undue in-

fluence from his association with the parties. And the necessity to explain and justify his decision in writing, or orally when called upon, is a powerful force for adequate checking of evidence secured *ex parte*. An arbitrator who can be trusted to make sensible decisions in his cloistered office on the basis of his own imagination and the exaggerations, recriminations, and confusions, if not deceptions, thrust upon him at the hearing, can surely be trusted to keep his senses in other forms of inquiry.

The current criticism of labor arbitration is not altogether unhealthy. Doubtless arbitration has not completely escaped the suspicions of chicanery, bias or stupidity which are sometimes evoked by courts and litigation. To the extent that the criticism emphasizes the need for careful appointment of qualified arbitrators and keeps arbitrators and parties on their mettle, it performs a useful function. The criticism must be appraised and may be good even if it should come from those who have not tasted of arbitration at its best; those who have employed arbitration in the hope of winning a case, rather than advancing the cooperative relationship in the joint enterprise; those who have not learned to doubt their own positions, and who yield to the easy escape of venting their disappointment on the process.

The suggestions for reform may be equally healthy. Particular parties may find one or more of them specially suited to their needs and may adopt them. A great value of arbitration is that it may be fitted to particular needs or tastes. But that value would be lost and the usefulness of the process impaired by general restrictions imposed on the process everywhere.

Some of the suggestions are in the image of the supposed, not the actual, judicial process. The distrust of socialization or mediation seems somewhat strange in the light of the relationship between bench and bar and the modern efforts at settlement through pre-trial conference. The call for carefully prepared stipulations exactly defining the issues and the powers of the arbitrator are somewhat at odds with the modern emphasis on liberal pleading, amendments to conform to the evidence, and the fashioning of appropriate remedies after trial.

A stipulation may, indeed, curb the arbitrator's discretion—but not necessarily for the good. Its preparation involves the temptation so to phrase the issue or the powers as to influence a favorable result. If one of the parties has legal representation or is otherwise subject to the charge of greater skill, the stipulation involves the risk of subsequent claim of overreaching or misunderstanding. And, in any event, the stipulation may hamper the exploration of the full problem and adoption of the best solution.

The desire for general standards, often expressed, is not so much a desire for standards in general, as it is for particular preferred standards to limit the arbitrator's discretion in a particular way. But that assumes a universal law which is lacking. It conflicts with the parties' complete control of arbitration. It imposes upon the particularity of each collective bargaining relationship a notion of universal regularity. And it exhibits a rather unwarranted faith that standards can be agreed upon, though not the settlement, and that the standards would make for different awards.

What is the effect of the extensive use of arbitration on the parties' collective bargaining? It is commonly feared that when parties agree upon arbitration as the terminal point of their grievance procedure, there results a tendency to push things to arbitration rather than to settle them in negotiation.

That there are forces making for that tendency is hardly deniable. The mere existence of the collective agreement, as already indicated, encourages insistence on contract right or fixed solution rather than negotiation of problems. And with a terminal step of arbitration, parties may be reluctant to yield or compromise a claim of contract right, at least for fear of criticism from associates or superiors. They may even be tempted to push to arbitration positions which they do not hold sincerely in order to "pass the buck" for a decision.

This may be especially true where the costs of arbitration are not on a per case basis, where the union has not developed a secure bureaucracy and is characterized by actual or threatened internal struggles for power, and where, on the management

side, day to day labor relations have not yet been established on a basis of primary importance and are administered by subordinate personnel with little authority and security.

To the extent that this tendency exists, it may not be unhealthy. It characterizes a necessary and helpful period of education. It spreads the benign feeling that reason has taken over and impartial justice is available. It supplants the alternative, costly remedy of cessation of work. And it provides training for the parties in the rational preparation, presentation and consideration of their claims.

Experience indicates that after the parties' relations have matured and some security in administration is established, the frequency of resort to arbitration declines. Some standing arbitrators are merely stand-by facilities rarely called into service.

So long as arbitration is voluntary, not compulsory, so long as arbitrators are privately selected, so long as collective agreements are within the parties' control and are not subject to general regulation as in the days of the War Labor Board, there need be little fear that arbitration will seriously hurt the functions of collective bargaining.

Thus far the parties' continuous relationship, rather than the periodic negotiations of contract terms, has been dealt with. This aspect of the industrial life, though less dramatic, is the more important. More important because it covers the greater periods of time upon which we are dependent for our national product, and because it permits calm planning and steady progress.

But it is more important for another reason. Establishment of sound relations through the continuous process described is a powerful influence in the settlement of disputes as to contract terms. The conditions under which men work during the year affect their demands at the year's end and their readiness to settle.

But additional forces come into play at contract negotiation time. Attention is concentrated on specific positive improvements for the future. More people on both sides become directly affected and actively interested. Issues become more stark. Leadership is exposed, becomes an easy target and must look to its protection.

Greater attention is focused on comparisons with accomplishments in other enterprises and by other unions. Resort to economic war—to cessation of production—becomes more imminent. The occasion is dramatized. The time for accomplishment is limited. Public favor is courted. And tension is increased by the steps necessary to be taken in anticipation of the possibility of cessation of work.

At this stage, too, the settlement of the dispute is primarily the function and responsibility of the parties. And upon their proper performance rests in large measure our general welfare. Arbitration has not been as widely employed here as in the adjustment of disputes under the contract. And the disputes on occasion result in the cessation of operations. Some of these may threaten considerable inconvenience to the public welfare. Few would deny the seriousness of the problem, the importance of the parties' recognizing the responsibility with which they are charged, and the desirability of making available effective agencies to aid the parties in their efforts at settlement.

But we must also remember that private settlement rests firmly on the threat of cessation of operations; and that freedom to disagree and to resort to cessation is the primary characteristic of private enterprise and collective bargaining. The parties must, indeed, exercise their powers carefully, lest they be stripped of their function and discharged of their responsibility. But equally must we be careful not to limit their powers unduly, lest we lose the very system we have chosen and hold dear.

Committee Reports

SPECIAL COMMITTEE ON MILITARY JUSTICE*

November 22, 1948

Committee on a Uniform Code of Military Justice,
Office of the Secretary of Defense,
Washington, D. C.

Attention: Professor Edmund M. Morgan, Chairman

Gentlemen:

The Chairman of the Committees on Military Justice of the American Bar Association, The Association of the Bar of the City of New York, the New York County Lawyers' Association and the War Veterans Bar Association, take this opportunity to submit, on behalf of the Associations which they represent, their recommendations with respect to essential reforms in the judicial systems of the Armed Services.

Each of the Committees has made an intensive study of the various systems of military justice and their practical application. All of the undersigned and most of the members of their committees are veterans of World War II with extensive military experience in many branches of the various services and in many parts of the world. These veterans have had wide experience in the actual operation of the court-martial system either in the Army, the Navy or the Air Force or have had ample opportunity to observe its operation in the field.

The Armed Forces have a primary mission to perform, both in peace and in war. Any code of military justice must be calculated to promote that mission and no reform of military justice, however attractive to the civilian mind, can or should be undertaken if its effect is to hamper that mission. It is our belief, based on actual experience in the field, that the recommendations which we make here will promote the morale of the Armed Forces and thus be of material aid in the effective conduct of their function.

Certain reforms have been effected for the Army, in the Elston Bill. Among these are:

1. The establishment of an independent Judge Advocate General's Department;
2. The requirement that the law member be a lawyer and be present throughout the trial;
3. The extension of the scope of review, to require Boards of Review to consider the weight of evidence in reviewing the judgment of the court.

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* This letter summarizes the recommendations of the Association's Special Committee on Military Justice, as adopted at the Stated Meeting held March 9, 1948.

It is our conviction that the reforms effected by the Elston Bill must be extended to all the Services. We deem it essential, however, that the following additional reforms be made, applicable to all Services:

1. That the judicial systems of the Armed Services be removed from command control;
2. That a simple system of review be adopted;
3. That in all general courts, and wherever possible in all other cases, both the Trial Judge Advocate and the assigned Defense Counsel be lawyers.

Of these the removal of command control from the courts is paramount and unless this be accomplished all other reforms will be ineffective.

COMMAND CONTROL

The maintenance of discipline is a function of command. It requires that command shall have the power to order the trial of all charges of breaches of military discipline; that it shall have the power to appoint the Trial Judge Advocate and control the prosecution; that upon the rendering of the Court's findings and sentence it shall have the right to exercise clemency.

There is a clear distinction between the right to order an accused to trial and to control the prosecution, which are undoubtedly command functions, and the right or power to influence the Court in determining the accused's guilt or innocence and the sentence to be imposed upon him. The latter are powers which command has expressly disavowed. Only by withdrawing from command the power to influence the Court can we be sure that it will not be exercised in the future as it has been in the past.

The War Department Advisory Committee on Military Justice on pp. 6 and 7 of its report, dated December 13, 1946, says:

> "The Committee is convinced that in many instances the commanding officer who selected the members of the courts made a deliberate attempt to influence their decisions. * * * Not infrequently the members of the court were given to understand that in case of a conviction they should impose the maximum sentence provided in the statute so that the general, who had no power to increase a sentence, might fix it to suit his own ideas."

A system which permits of such abuse can only result in a lowering of morale. It is as essential to the preservation of morale that the personnel of the Armed Forces believe the system to be fair, as that it be administered fairly. To achieve this wholly desirable result we advocate only that command, which controls the prosecution, should not also appoint and control the court and Defense Counsel. That morale may be maintained without interference with the proper functions of command, requires the appointment of the court and Defense Counsel by an independent judicial arm of the service.

Using the Army organization as an example this may be accomplished in the following manner:

The convening authority will be the President of the United States, or the Judge Advocate General's Department who is attached to a territorial department, the Superintendent of the Military Academy, an Army group or Army, and, when empowered by the President, the Judge Advocate General of the Army or Theater Judge Advocate may designate the ranking member of the Judge Advocate General's Department of any district or of any force or body of troops as a convening authority. In the case of the Navy or Air Force the equivalent unit of command may be substituted for those above enumerated.

The commanding officer to whose command a convening authority is attached shall designate to such convening authority the officers and enlisted men in his command available for service on courts-martial. The commanding officer may, as his requirements dictate, change the personnel so designated. From such panel the convening authority shall select the courts necessary to discharge the judicial function of the command.

Ordinarily the commanding generals at Army level will require the commanding generals of divisions and corps within his command to make available to the convening authority the requisite personnel. It is to be expected that in normal course the court appointed to try cases involving personnel of any division or corps headquarters will be selected from the personnel of that division or corps. But, when required in the interests of justice, the convening authority will have the power to order that the accused be tried by a court composed of officers and men from a different division or corps.

The reason for empowering the Judge Advocate General of the Army or a Theater Judge Advocate to designate a convening authority at lower levels than Army is to take care of the situation where, due to geographical or other circumstances, a smaller unit than an Army must have general court-martial jurisdiction.

The commanding officer, having referred the charges for trial and the Court having made its findings and pronounced its sentence, the record will then be forwarded to such commanding officer for his action with respect to mitigation or remission of sentence. The record will then be forwarded to the convening authority for review and his powers of review should be those given the appointing authority in the Elston Bill. The convening authority will prepare a written review which will become part of the record and he shall have the power to approve and order executed such findings and sentence, in whole or in part, as he believes warranted by the evidence and the applicable law. He shall also have the power to order a rehearing in the event that he shall disapprove the findings.

FINAL REVIEW

The final review of the case should be accomplished by a single Board of Review which shall have as many divisions as may be required. These divisions will sit either in Washington or in a Theater. This procedure should

constitute final review, except in those cases which by law require confirmation by higher authority.

Present A.W. 50, contained in the Elston Bill, is so complicated as probably to be unworkable—and certainly it is unintelligible. It should be repealed.

COUNSEL

One of the principal, and we believe well justified, complaints against the administration of military justice during World War II was that the accused was inadequately represented. Defense Counsel were all too frequently untrained, both in the law and in military justice procedure. The Elston Bill does not make mandatory the appointment as counsel of men trained in the law even with respect to trials by general courts-martial. It provides merely that the Trial Judge Advocate and Defense Counsel shall "if available" be lawyers, and that if the Trial Judge Advocate be a lawyer then the Defense Counsel must also be a lawyer. It has been held repeatedly that the determination of whether an officer is "available" is not subject to review.

That counsel in military trials should be lawyers is not disputed. If this be so, surely the Armed Services should be required to make available the personnel necessary to assure the accused of a fair trial.

Further to preserve the rights of the accused Defense Counsel should be required to include as part of the record a statement of the errors which he believes were committed in the course of the court-martial proceedings and he should be afforded the opportunity to submit a brief in support of his contentions.

SPECIAL COURTS-MARTIAL

In so far as practicable the procedure of special courts-martial should be assimilated to that of general courts. As a minimum requirement, a law member who is either a lawyer or a member of the Judge Advocate General's Department should be designated in all cases except those involving a charge under A.W. 61 (absence without leave).

Commanders of the Armed Forces of this country must realize that they are dealing with men whose initiative, ingenuity and independent self-respect have made them the best soldiers, sailors and airmen in the world. Nothing can be worse for their morale than the belief that the game is not being played according to the rules. The foundation stone of the morale of the Armed Forces must be the conviction that when a member is charged with an offense his case will not rest entirely in the hands of his commander, but that he will be able to present his evidence to an impartial tribunal with assistance of competent counsel and that he will receive a fair and independent review. He is an integral part of the Armed Forces and the courts of those forces are his system of justice.

These considerations of justice are as important in time of peace as in time of war. As our outlook upon world affairs and our concepts of military service have broadened, national defense has become a matter of concern to

every citizen. With the advent of peacetime selective service the need to emphasize the fairness of the military justice system increases.

Our present system of military justice has proved sadly deficient in two wars. We cannot now be satisfied with half measures. Nothing less than the reforms which we here advocate can effect the true administration of justice in our court-martial system.

Very truly yours,

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The Library

SIDNEY B. HILL, *Librarian*

SELECTED ACQUISITIONS, 1948

What books must be added during the course of a year to keep up to date the research collection of this library? An examination of the selected list of acquisitions during the current year will reveal the many subject fields which must be consulted by the practitioner in his research.

It is hoped that this list will provide the members with a convenient guide to recent publications of legal interest.

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